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Supreme Court, U.S.
FILED

08-109 JUL 22 2008

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No.

In the Supreme Court of the United States

LAKE FOREST PARTNERS 2, INC.

Petitioner

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

GREGORY M. ELLIOTT
Counsel of Record
GREGORY M. ELLIOTT, P.L.C.
WASHINGTON SQUARE BLDG.
202 E. WASHINGTON ST.
SUITE 711
ANN ARBOR, MI 48104
(734) 662-4212

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QUESTION PRESENTED FOR REVIEW

Where Respondent has treated similarly situated taxpayers differently with respect to substantively similar transactions, does such treatment violate Petitioner's rights pursuant to U.S. Constitution, Amendment 14?

PARTIES TO PROCEEDING AND CORPORATE DISCLOSURE

Petitioner, Lake Forest Partners 2, Inc., is a Michigan corporation with its principal place of business in Pittsfield Township, Washtenaw County, Michigan.

Respondent, Michigan Department of Treasury, is a department of the executive branch of the State of Michigan.

Pursuant to Rule 29.6, Petitioner states that it is not a publicly held company and that no parent or publicly held company that owns more than 10% of its stock.

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CITATION TO OPINIONS BELOW

The Orders of the Supreme Court of the State of Michigan are *Lake Forest Partners 2, Inc. v. Michigan Department of Treasury*, 480 Mich. 1046, 743 N.W.2d 881 (Mich. 2008), *reconsideration denied*, 480 Mich. 1169, 747 N.W.2d 226 (Mich. 2008). The Opinion and Order of the Michigan Court of Appeals is found at 271 Mich. App. 244, 720 N.W.2d 770 (Mich. App. 2006). The Opinion and Judgment of the Michigan Tax Tribunal can be found at 2004 WL 2251834. All of the foregoing appear in the Appendix to this petition.

JURISDICTION

The Michigan Supreme Court denied Petitioner's Motion for Reconsideration of its February 1, 2008 Order on April 23, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) and Rule 13(1) and (3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides, in relevant part, that:

> [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Lake Forest Partners 2, Inc. ("Lake Forest") was a developer of residential subdivisions in Pittsfield

Township, Washtenaw County, Michigan at all times relevant to this case. It has subsequently ceased operations. For the most part, Lake Forest sold its lots to builders, who in turn entered into contracts with home buyers. On some occasions, Lake Forest's own building division, which did business as the Johnson Building Group, built homes on Lake Forest lots.

By Michigan statute (the "Transfer Tax Acts" or the "Acts"), a tax is due when an interest in real property is transferred from seller to buyer. Separate statutes provide for the collection of a portion of the tax to be retained by the home county and a portion to be remitted to the state. The seller has the duty to collect (though not necessarily the duty to pay) the tax. The county in which the property is located collects real estate transfer taxes (the "Transfer Tax") for the benefit of both the county and the state. Though the county and state portions of the Transfer Tax are codified in two separate and parallel statutes, the operative statutory provisions of each are essentially identical. *Lake Forest Partners 2, Inc. v. Michigan Department of Treasury,* 271 Mich. App. 244, 246, 720 N.W.2d 770, 771, n. 1 (Mich. App. 2006) (stating that the State and County provisions "essentially mirror" one another) [Appendix, p. A-6].

Accordingly, when Lake Forest sold real estate, it paid the Transfer Tax. The amount of taxes it paid depended on what was being sold when a contract for the sale of the land was executed. It is undisputed that in all cases in which a lot and completed house existed at the time of contracting, Lake Forest paid the Transfer Tax on the value of the home and lot. In those cases in which a lot was vacant at the time of contracting, Lake Forest paid the Transfer Tax on the value of the vacant lot only. (*See Lake Forest Partners 2, Inc. v. Michigan Dept. of Treasury,* 2004 WL 2251834 (Mich. Tax Tribunal) [Appendix, starting at p. A-17, ¶ 3].)

In the 45 transactions at issue in this case, Lake Forest sold a vacant lot to a customer and concurrently entered into an agreement to build a house for that customer. The two agreements were reflected in a single executory contract called a "Purchase Agreement," which, as the parties stipulated, set forth separately the consideration being paid for the lot and the consideration being paid for the construction of the house. (*Id.* at ¶ 5 [Appendix, p. A-18].) The purchase agreement provided for a down payment and a final balance to be paid when the home was completed and a certificate of occupancy was issued by the municipality. Upon payment of the final balance, Lake Forest paid the State and County portions of the Transfer Tax on the value of the unimproved real estate as it existed at the time of the execution of the contract. The tax amount was computed on the basis of the separate consideration that the buyer paid for the lot, as shown in the contract for sale and the deed. After Petitioner had followed this procedure for several years, Washtenaw County (the "County") advised it that it felt its method of calculating the Transfer Tax due was incorrect.

The Prior Circuit Court Proceedings.

In the Spring of 2000, the County brought an action in the Circuit Court (the "Circuit Court litigation") claiming that Lake Forest had failed to pay sufficient Transfer Tax on the same 45 transactions involved in the instant case. Despite the fact that the land involved was unimproved real estate when the Lake Forest executory contracts were signed, the County contended that Lake Forest "should have paid real estate transfer taxes on the combined value of the lot and the home that was ultimately built on the lot." (*Id.* at ¶ 6 [Appendix, p. A-18].) Lake Forest disputed that contention, relying *inter alia* on the language of the Transfer Tax Act provisions, and on a prior decision of the Michigan Tax Tribunal, *Sunshine Properties, Inc. v. Michigan Dept. of Treasury*, MTT Docket 267345 (2000), *rehearing denied* (2001)

("*Sunshine*"). The Tribunal held in *Sunshine* that, under the Transfer Tax Act, transfer tax in this situation was owed on the value of the vacant lot only.

Lake Forest and the County filed cross-motions for summary disposition in the Circuit Court. The Circuit Court, in addressing those motions, ruled that Lake Forest had no additional tax liability. (Tax Tribunal Opinion at ¶ 7 [Appendix, starting at p. A-18].) While the Court rejected, in part, Lake Forest's view of the proper construction and application of the Transfer Tax Act with respect to transactions of the type involved in this case, it found that the statute was not clear, and a subsequent consent judgment was entered clarifying the parties' understanding of the statute for purposes of going forward. (*Id.* at ¶ 8 [Appendix, p. A-19].) "Under the consent order, so long as two documents in the prescribed form are used to reflect the lot sale and home construction contract, the real estate transfer tax will be assessed on the value of the vacant lot only, and not on the value of the lot and the home that is ultimately built on the lot." (*Id.*) While Lake Forest did not agree that two documents were required, it nevertheless had no objection to using the two-document form rather than a one-document form once it learned the County's preferences in this regard. (*Id.* at ¶ 9 [Appendix, p. A-19].)

The Tax Tribunal Proceeding.

In light of the ruling that Lake Forest was not liable for additional transfer taxes, and in light of the consent judgment in the Circuit Court litigation with respect to post-complaint transactions, Lake Forest had no reason to believe that Treasury would claim any tax deficiency with respect to Treasury's portion of the transfer taxes owed in connection with those 45 transactions. But to Lake Forest's great surprise, shortly after the Circuit Court action, Treasury chose not to respect the Circuit Court's decision. Instead, it proceeded to issue a Notice of Intent to Assess

the State's portion of Transfer Tax due on the same 45 transactions that were addressed in the Circuit Court, and on the basis of a reading of the statute that was directly antithetical to the reading given by the Tribunal in *Sunshine*. And, though Lake Forest did not know it at the time, Treasury's position directly contradicted advice it had given to one the country's largest home-builders in a letter ruling issued just two months prior to the audit period it had analyzed with respect to Lake Forest's transactions (the "Pulte Letter Ruling"). (*See* Appendix, starting at p. A-35.) Treasury has repeatedly advanced the view in these proceedings that inconsistencies in the application of the law by the State, its political subdivisions, the courts, and even Treasury itself, do not matter, a surprising invitation to apply the law in an arbitrary way.

Cross-motions for summary disposition in the Tax Tribunal were filed by Treasury and Lake Forest in the Spring of 2003, and decided more than a year later, in July 2004. Treasury's brief construed the Transfer Tax Act to mean that if the Lake Forest contract transferred "any interest" at time of transfer, then taxes would be owed on the value of the vacant lot at time of transfer. If, on the other hand, the Lake Forest contract did not convey any interest at the time it was entered, then the Transfer Tax Act required the payment of taxes on the value of the later-completed home and lot at the time the deed was recorded. (Treasury's 5/29/03 Brief at p. 6; *see also* Tax Tribunal Opinion, Respondent's Position [Appendix at p. A-24].) Accordingly, the issue before the Tribunal, as framed by Treasury, was whether the Lake Forest executory purchase agreement conveyed any interest in property upon its execution. (*Id.* at p. 6). Lake Forest agreed with Treasury's framing of the issue. (Lake Forest's 6/12/03 Brief at pp. 1-2).

Lake Forest maintained that under the longstanding doctrine of equitable conversion, any

executory contract for the sale of land (whether styled "land contract" or not) conveyed an interest in real estate—specifically, an equitable interest—and hence that taxes were owed on the value of the vacant lot at time of transfer of the interest (i.e., at time of contract). Treasury argued that the Lake Forest agreement did not transfer an equitable interest, principally because the agreement was not denominated "land contract." Accordingly, Treasury's position was that the plain meaning of the statute required transfer taxes to be paid on the value of the lot at the time of recording of the deed, which would reflect the value of the later-built house. In the alternative, Lake Forest argued, *inter alia*, that, consistent with principles of due process, at the very least, Lake Forest was entitled to the protections of the rule requiring ambiguous tax statutes to be construed in the taxpayer's favor, that, if the Tribunal were to depart from the holding in *Sunshine,* then any ruling against Lake Forest should be given prospective effect only, and that Lake Forest would owe no additional taxes if it had simply used what Treasury regarded as the right contract forms (an arbitrary distinction). (Lake Forest's 5/30/03 Brief, 6/12/03 Brief, and 6/25/03 Brief in the Tax Tribunal).

The Tribunal rejected all of Lake Forest's arguments in its July 12, 2004 Opinion and ruled that Lake Forest owed tax in the amount of $65,968, together with a penalty in the amount of $16,492, plus interest (which has accrued to more than $35,000). (*See* Tax Tribunal Opinion [Appendix, starting at p. A-14].) Lake Forest believed that the Tribunal's analysis was seriously flawed in numerous respects, including its articulation of several new requirements that an executory contract must have in order to transfer an equitable interest. These requirements were completely contrary to settled principles regarding the doctrine of equitable conversion, and hence were not consistent with the law.

Michigan Appellate Proceedings.

Lake Forest appealed the Tribunal's decision to the Michigan Court of Appeals, which reversed the Tax Tribunal in a 2 to 1 decision issued on June 6, 2006. *Lake Forest Partners 2, Inc. v. Michigan Department of Treasury,* 271 Mich. App. 244, 720 N.W.2d 770 (Mich. App. 2006). The Michigan Court of Appeals construed the Transfer Tax Act in a fashion completely consistent with Lake Forest's interpretation, the interpretation adopted by the Tax Tribunal in the *Sunshine* case, and the advice given by Treasury in the Pulte Letter Ruling. For that reason, it did not address any of Lake Forest's other arguments.

Treasury then sought leave to appeal this decision to the Michigan Supreme Court, but, in its Application, it abandoned both the construction of the Transfer Tax Act it urged in the Tax Tribunal, and its argument that the Lake Forest contract did not transfer an equitable interest. Without acknowledging its about-face, Treasury's application advanced an argument that directly contravened both the position it took before the Tribunal and Court of Appeals and the position the County took in the Circuit Court litigation regarding the "plain meaning" of the statute. Treasury now conceded, in its application, that the Lake Forest agreement transferred an equitable interest. (*See, e.g.,* Treasury's Application for Leave to Appeal to the Michigan Supreme Court at p. 12). Treasury's new statutory argument was that, regardless of the fact that Lake Forest documents did transfer equitable title, additional tax would also be owed based upon any additional value accruing to the real estate before the subsequent recording of a deed in consummation of its land contracts. This position, which appeared to parrot the position of the dissenting judge in the Court of Appeals, directly contradicted the decision in the *Sunshine* case, the

Pulte Letter Ruling (and the authority under which it was issued)[1], the consent judgment entered in the Washtenaw Circuit Court proceeding, and common practice. For the first time, in an even more dramatic about-face during oral argument before the Michigan Supreme Court, counsel for Treasury asserted that the Pulte Letter Ruling was wrong. (Transcript of Oral Argument before the Michigan Supreme Court, October 3, 2007, p. 7.)

In response to Treasury's application for leave, Lake Forest briefed its position that, due to the arbitrary nature of Treasury's application of the Transfer Tax Act, its newly asserted interpretations of its meaning would offend U.S. Constitution, Amendment 14. (Lake Forest's Brief in Response to Application for Leave to Appeal, 2006 WL 4822574 (Mich.) at p. 5.) Lake Forest also reiterated its position below that retroactive application of any new interpretation of the Act would be unfair. (*Id.* at p. 48.) It was joined in its constitutional argument by Amicus Michigan Association of Realtors. (Brief Amicus Curiae in Support of the Position of Petitioner/Appellee, Lake Forest Partners 2, Inc., 2006 WL 4822576 (Mich.) at p. 8.) As noted, these questions had not been reached in the Court of Appeals because it found for Lake Forest on the plain meaning of the Act.

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[1] Pursuant to Revenue Administrative Bulletin 1989-34, adopted on April 25, 1989 under the authority of MCLA 205.3(f) and under which the Pulte Letter Ruling was issued, "[i]f the Commissioner acquiesces in an adverse Tax Tribunal or Court of Claims decision, any contrary Letter Ruling or Revenue Administrative Bulletin shall be promptly modified or revoked." Since Treasury did no such thing, it can only mean one of two things; either (1) up until the time of oral argument in the Michigan Supreme Court, Treasury believed that there was some sort of distinction between the kind of transaction described therein and Lake Forest's transactions at issue here or (2) it failed to revoke its ruling as to Pulte even though it was taking a contrary position with respect to Lake Forest.

Though the Michigan Supreme Court did not accept leave, in a brief order, it seemed to accord weight to Treasury's assertion, apparently unsupported in the record below, that none of the transactions at issue was recorded (this had never been at issue in the proceeding and though Lake Forest admitted that it did not record its documents, its purchasers certainly could have). It ruled that, because it believed the deed was the first document recorded, Transfer Tax would be due on the value of the real estate as of that time. *Lake Forest Partners 2, Inc. v. Michigan Department of Treasury*, 480 Mich. 1046, 743 N.W.2d 881 (Mich. 2008), *reconsideration denied*, 480 Mich. 1169, 747 N.W.2d 226 (Mich. 2008). It remanded the matter to the Michigan Tax Tribunal for reinstatement of the assessment at issue. Its Order provided that no penalty should apply, but it is unclear whether or not interest is to accrue. (Treasury has taken the position that it should.) In its motion for reconsideration, Lake Forest amplified its constitutional arguments, especially related to the Equal Protection Clause. (*See* Lake Forest's Motion for Reconsideration of Supreme Court's February 1, 2008 Order dated February 22, 2008.)

REASONS FOR GRANTING THIS PETITION

This case raises important questions regarding the ability of a state agency to seek retroactive application of a novel interpretation of a tax statute. It is particularly troublesome arising as it does in the context of very difficult economic circumstances in the State of Michigan, which are straining the budgets of not only its executive branch, but also its judiciary. Indeed, as the parties were preparing for oral argument in this matter (which was held on October 3, 2007), it was unclear whether or not it would take place given that a shut down of Michigan's government loomed just two days earlier. (*See* Nick Bunkley, *Michigan Shuts Down Government*, The New

York Times, October 1, 2007 *available at* http://www.nytimes.com/2007/10/01/us/01michigan.html.)

Where Respondent has treated similarly situated taxpayers differently with respect to substantively similar transactions, does such treatment violate Petitioner's rights pursuant to U.S. Constitution, Amendment 14?

No one can argue, in any principled way, that the Transfer Tax Acts are unambiguous. By failing to define the term, "transfer," which is central to construing their meaning, they are rendered hopelessly so. *See* MCLA 207.522 (definitions for the State Real Estate Transfer Tax Act). Though it might have done so, the Order of the Michigan Supreme Court in this matter has done little to clarify the situation, apparently only fixing liability for Lake Forest and leaving Treasury free going forward to continue its practice of shifting it interpretation as circumstances dictate. Yet, Lake Forest is now faced with a tax liability that is potentially in excess of $100,000.00, one that it would not have incurred if only the meaning of the statute had been clear. If, as the Michigan Supreme Court seems to say, it is recording that fixes the value to be taxed, Lake Forest could easily have recorded the contracts at issue (and, as noted above, it is not even clear that the purchasers did not). It could have required, in its contracts, for the purchasers to be liable for any additional tax accruing on account of new home construction. Or it might have deeded the lots to the purchasers before constructing the home, taking back a mortgage in the amount then owing. This latter option—which shows the true nature of these transactions, i.e. builder financing of new home construction in lieu of a construction loan by the purchaser—clearly points to the arbitrary nature of Treasury's position, since even it would acknowledge that no tax is due in that circumstance. (*See* Transcript of Oral

Argument before the Michigan Supreme Court, October 3, 2007, at p. 5.)

> [...] The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule has often been stated to be that the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation."

Allied Stores of Ohio v Bowers, 358 U.S. 522, 527 (1959).

The Michigan Supreme Court has articulated a similar analysis.

> Where an ordinance fails to include and affect alike all persons of the same class, and extends immunities or privileges to one part and denies them to others of like kind by unreasonable or arbitrary classification, the same is contrary to the equal protection guarantees of the State and Federal Constitutions.

Armco Steel Corp v Dept. of Treasury, 419 Mich 582, 592; 358 NW2d 839 (1984), *affg. Great Scott Supermarkets, Inc v Dep't of Treasury,* 113 Mich App 679; 318 NW2d 537 (1982), *quoting Beauty Built Construction Corp.,* 375 Mich. 229, 235-236, 134 N.W.2d 214, 218 (1965) (no rational basis for arbitrary treatment of similarly situated corporate franchise taxpayers).

There is certainly no more immediate impact on one's rights in property than when the government determines that one owes it money. In a circumstance in

which two parties do business in essentially the same way, and one owes substantial tax liability on its activities, whereas its competitor does not, equal protection is not afforded. Those are the circumstances of this case. Lake Forest followed a common practice among land developers that also had building divisions. It, in essence, offered financing to its customers by agreeing to fund the construction of the home before the customer closed on the lot. Thus, at the end of the process, the customer got just one end loan, obviating the need for an intermediate construction loan and saving those attendant fees. So common was this practice, that one of the country's largest builders, through its counsel, sought and received a letter ruling from Treasury that described the transaction with particularity. In spite of that, Lake Forest has been singled-out by Treasury, first on the pretext that its documents were somehow inadequate to take advantage of this provision of the Act, but then, when that failed, based an entirely novel interpretation of the Act.

When Treasury's counsel got up before the Justices of the Michigan Supreme Court and announced that the Pulte Letter Ruling was wrongly decided, it admitted that it had afforded unequal treatment under the Act. Because the statute of limitations had run, for the audit period in question, it was guaranteed that Treasury could not treat Pulte, nor any of the very many other builders it had never pursued, in the same fashion as it had Lake Forest. *See* MCLA 205.27a(2). It also admitted as much when it stated that, had Lake Forest just deeded the lot prior to building the customer's house, it would likewise owe no tax. However, the fact is that it had long ago admitted to such unequal treatment with its failed argument in the Tax Tribunal and the Court of Appeals that somehow Lake Forest's contract, because it did not incant the words, "land contract," was distinguishable from whatever it felt a land contract should be. All of these distinctions are without

substance, and each denies equal protection to Lake Forest.

This inequity could be avoided if the Michigan Supreme Court's newly adopted interpretation of the Act was given prospective-only application. This Court has analyzed when such treatment is appropriate.

> Our decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97, (1971), sets forth the three considerations recognized by our precedents as properly bearing upon the issue of retroactivity. They are, first, whether the holding in question "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed" by earlier cases, ; second, "whether retrospective operation will further or retard [the] operation" of the holding in question, and third, whether retroactive application "could produce substantial inequitable results" in individual cases. (Parallel and internal citations omitted.)

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982); *see also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *Buckley v. Valeo*, 424 U.S. 1 (1976); *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).

As noted above, the ambiguity of the Transfer Tax Acts, as is clearly shown by the widely divergent interpretations given to it by counties, the Michigan Court of Appeals, the Michigan Tax Tribunal, the Washtenaw County Circuit Court, and Treasury itself, is manifest. Given that, Lake Forest's tax liability could not have been clearly foreshadowed. And given that there were many options available to Lake Forest (noted above) to structure its transactions in such a way as to avoid additional tax liability, retroactively applying the newly revealed

meaning of the statute will work extremely inequitable results, especially where Lake Forest's competitors enjoyed more favorable tax treatment for the period in question and where Treasury is precluded, by virtue of the passage of time, from assessing Lake Forest's competition for that period. Finally, though Treasury might not wish to admit it, retroactive application of the new interpretation of this statute actually does retard its effectiveness, given the issues of unfairness inherent therein.

CONCLUSION

If a government agency can decide, contrary to long-standing practice, that an ambiguous statute now means something other than what it appeared to mean, and then apply that revised meaning retroactively, the prospects for abuse are truly chilling. It is too late for Lake Forest to go back and restructure its transactions, or to renegotiate its contracts to afford it the income needed to pay the tax that is now due given Treasury's novel interpretation of the Act. Under such circumstances, principals of due process require that Treasury be enjoined from collecting this assessment.

July 21, 2008

RESPECTFULLY SUBMITTED:

s/Gregory M. Elliott
Counsel of Record
Gregory M. Elliott, P.L.C.
202 E. Washington St., Ste. 711
Ann Arbor, MI 48104
(734) 662-4212

Supreme Court of Michigan.

LAKE FOREST PARTNERS 2, INC., Petitioner-Appellee,

v.

DEPARTMENT OF TREASURY, Respondent-Appellant.

Docket No. 132013.

480 Mich. 1169, 747 N.W.2d 226

COA No. 257417.

April 23, 2008.

Prior report: 480 Mich. 1046, 743 N.W.2d 881.

On order of the Court, the motion for reconsideration of this Court's February 1, 2008 order is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

MICHAEL F. CAVANAGH and MARILYN J. KELLY, JJ., would grant reconsideration.

Supreme Court of Michigan.
LAKE FOREST PARTNERS 2, INC., Petitioner-Appellee,
v.
DEPARTMENT OF TREASURY, Respondent-Appellant.
Docket No. 132013.
480 Mich. 1046, 743 N.W.2d 881
COA No. 257417.
Feb. 1, 2008.

On October 3, 2007, the Court heard oral arguments on the application for leave to appeal the June 6, 2006 judgment of the Court of Appeals. On order of the Court, the application for leave to appeal is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we REVERSE the part of the Court of Appeals judgment that reversed the Michigan Tax Tribunal order that concluded that petitioner should have paid the State Real Estate Transfer Tax based on the value of the lots as improved by the homes. The State Real Estate Transfer Tax Act, MCL 207.521, *et seq.*, taxes recorded instruments. MCL 207.523. In this case, the only recorded instrument was the deed. The "value" exchanged for that deed included both the cost of the lot and the home; thus, the tax tribunal correctly held that that value was the proper measure for taxation.

We REVERSE the Michigan Tax Tribunal's order imposing penalties against petitioner. The Department of Treasury did not prove that petitioner acted negligently or with any intent to defraud when it paid taxes on the value of the unimproved land. The imposition of penalties is not warranted in the absence of such evidence. MCL 205.23(3); Michigan Administrative Code, R. 205.1012. We REMAND this case to the Michigan Tax Tribunal for entry of an order reinstating petitioner's assessment but reversing the imposition of penalties.

MICHAEL F. CAVANAGH, J., would deny leave to appeal.
MARILYN J. KELLY, J., would grant leave to appeal.

Court of Appeals of Michigan.

LAKE FOREST PARTNERS 2, INC., Petitioner-Appellant,

v.

DEPARTMENT OF TREASURY, Respondent-Appellee.

Docket No. 257417.

271 Mich.App. 244, 720 N.W.2d 770

Submitted Feb. 8, 2006, at Lansing.

Decided June 6, 2006, at 9:05 a.m.

Released for Publication Aug. 31, 2006.

Background: Taxpayer appealed judgment of the Tax Tribunal affirming Department of Treasury's assessment of the state real estate transfer tax for purchase agreements that included both the sale of unimproved property and an executory contract to build a home on that property.

Holding: The Court of Appeals, Zahra, J., held that value of property for purposes of assessment of the state real estate transfer tax was determined at the time purchase agreements were executed.

Reversed and remanded.

Davis, J., dissented and filed opinion.

Stefan B. Herpel, P.C. (by Stefan B. Herpel), Ann Arbor, for the petitioner.

Michael A. Cox, Attorney General, Thomas L. Casey, Solicitor General, and Roland Hwang, Assistant Attorney General, for the respondent.

McClelland & Anderson, L.L.P. (by Gregory L. McClelland and Melissa A. Hagen), Lansing, for the Michigan Association of Home Builders.

Honigman Miller Schwartz and Cohn LLP (by Alan M. Valade and Regis A. Carozza), Detroit, for Wexford Builders, Inc.

Before: WILDER, P.J., and ZAHRA and DAVIS, JJ.

ZAHRA, J.

Petitioner appeals as of right the judgment of the Tax Tribunal affirming respondent's assessment under the State Real Estate Transfer Tax Act (SRETTA), MCL 207.521 *et seq.* This case addresses the propriety of assessments under the SRETTA for purchase agreements that include both the sale of unimproved*246 property and an executory contract to build a home on that property. We conclude that the value of the property for purposes of assessment of the state real estate transfer tax is determined at the time the parties execute the purchase agreement. We reverse and remand.

A. Facts and Proceedings

This case involves 45 transactions in which petitioner agreed to sell buyers certain unimproved lots and subsequently build homes on those lots. In each transaction, a single document entitled "purchase agreement" provided the terms of the sale of the unimproved lot and the terms of the agreement to build a home on that lot. The parties stipulated that the purchase agreement separately stated the consideration for the lot and the consideration to build the home. The purchase agreement also provided that after petitioner completed construction of the home and a certificate of occupancy was issued, petitioner would deliver a warranty deed to the buyer. When the deed was recorded, petitioner paid real estate transfer taxes based on the value of the lot as it

existed when the purchase agreement was executed.[FN1]

> FN1. The same 45 transactions were initially the subject of a circuit court case, *Washtenaw Co v. Lake Forest Partners 2, Inc,* LC No. 00-579-CH. In that case, the county argued that, under the real estate transfer tax act (RETTA), MCL 207.501 *et seq.*, which essentially mirrors the SRETTA, petitioner should have paid the county on the basis of the value of the lot and the home. The case was resolved by a consent order, under which the parties agreed that as long as petitioner used separate contracts in these types of transactions, i.e., one for the sale of the lot and one for the construction of the home, the RETTA tax would be assessed only on the basis of the value of the lot.

In May 2002, respondent Department of Treasury determined that, under the SRETTA, petitioner failed to pay the appropriate transfer taxes in each of the 45 transactions. Respondent concluded that petitioner should have paid transfer taxes based on the value of the lot and the home. Respondent ordered petitioner to satisfy a tax deficiency of $65,968, plus a penalty ($16,492) and interest. Petitioner filed its petition with the Tax Tribunal for reconsideration of respondent's assessment, which the Tax Tribunal denied.

B. Standard of Review

This Court reviews decisions of the Tax Tribunal only to determine whether the tribunal committed an error of law or applied the wrong legal principles. Const.1963, art. 6, § 28; *AERC of Michigan, LLC v. City of Grand Rapids,* 266 Mich.App. 717, 722, 702 N.W.2d 692 (2005), citing *Schultz v. Denton Twp.*, 252 Mich.App. 528, 529, 652 N.W.2d 692 (2002). Also, this Court reviews the interpretation of statutes, which is a question of law, de novo. *AERC of Michigan, supra* at 722, 702 N.W.2d 692, citing *Florida Leasco, LLC v. Dep't of Treasury,* 250 Mich.App. 506, 507,

655 N.W.2d 302 (2002).

C. Analysis

MCL 207.523 provides:

(1) There is imposed, in addition to all other taxes, a tax upon the following written instruments executed within this state when the instrument is recorded:

(a) Contracts for the sale or exchange of property or any interest in the property or any combination of sales or exchanges or any assignment or transfer of property or any interest in the property.

(b) Deeds or instruments of conveyance of property or any interest in property, for consideration.

(2) The person who is the seller or grantor of the property is liable for the tax imposed under this act.

The state real estate transfer tax is "levied at the rate of $3.75 for each $500.00 or fraction of $500.00 of the total value of the property being transferred." MCL 207.525. " 'Value' means the current or fair market worth in terms of legal monetary exchange *at the time of the transfer*." MCL 207.522(e) (emphasis added). While the transfer tax is paid "when the instrument is recorded," MCL 207.523(1), the transfer tax is assessed on "the current or fair market worth ... at the time of the transfer," MCL 207.522(e).

" '[O]ur primary task in construing a statute, is to discern and give effect to the intent of the Legislature.' " *Neal v. Wilkes*, 470 Mich. 661, 665, 685 N.W.2d 648 (2004),

quoting *Sun Valley Foods Co. v. Ward*, 460 Mich. 230, 236, 596 N.W.2d 119 (1999). " 'The words of a statute provide "the most reliable evidence of its intent...." ' " *Neal, supra* at 665, 685 N.W.2d 648, quoting *Sun Valley, supra* at 236, 596 N.W.2d 119, in turn quoting *United States v. Turkette*, 452 U.S. 576, 593, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). "Unless defined in the statute, every word or phrase of a statute will be ascribed its plain and ordinary meaning." *Robertson v. DaimlerChrysler Corp.*, 465 Mich. 732, 748, 641 N.W.2d 567 (2002). " '[C]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.' " *Jenkins v. Patel*, 471 Mich. 158, 167, 684 N.W.2d 346 (2004) (citation omitted). "[P]rovisions not included by the Legislature should not be included by the courts." *Polkton Charter Twp. v. Pellegrom*, 265 Mich.App. 88, 103, 693 N.W.2d 170 (2005) (citation omitted).

Each of the 45 transactions involved the execution of two written instruments: a purchase agreement and a deed. Of those two instruments, only the deed was recorded, and, thus, only the deed was taxed. MCL 207.523(1). Although the purchase agreements were not recorded, they are nonetheless "[c]ontracts for the sale or exchange of property" under MCL 207.523(1)(a). Because the transfer tax may be imposed on purchase agreements, we conclude that upon the execution of a purchase agreement, some interest in the property is transferred under the SRETTA. Respondent's contention that interest in the property is transferred only by execution of the deed ignores the language of MCL 207.523(1)(a). The transfer tax is assessed on "the current or fair market worth ... at the time of the transfer." MCL 207.522(e). We therefore conclude that the transfer tax is assessed on the basis of the value of the property when the purchase agreement is executed.[FN2]

FN2. We note that, under MCL 207.526, the purchase agreements may arguably be classified as "written instruments and transfers of property" that are exempt from the tax. Specifically, the purchase agreements may be characterized as "land contract[s] in which the legal title does not pass to the grantee until the total consideration specified in the contract has been paid," MCL 207.526(*o*). However, as mentioned, the purchase agreements in this case were not recorded, and thus whether they are exempt under MCL 207.526 is purely academic. In any event, we disagree with the suggestion that the land-contract exemption delays the assessment of taxes rather than the date on which the transfer tax is paid. We conclude that the land-contract exemption delays the date on which the transfer tax is paid, and merely allows buyers to record land contracts without immediately paying the tax, thus protecting the buyers' rights under the land contract until a deed is executed.

Further, it is well-settled that the execution of a purchase agreement transfers an interest in property. See *Graves v. American Acceptance Mortgage Corp. (On Rehearing)*, 469 Mich. 608, 614, 677 N.W.2d 829 (2004); *Stevens v. DeBar*, 229 Mich. 251, 253, 200 N.W. 978 (1924); *Zurcher v. Herveat*, 238 Mich.App. 267, 291, 605 N.W.2d 329 (1999); *Pittsfield Charter Twp. v. City of Saline*, 103 Mich.App. 99, 103, 302 N.W.2d 608 (1981). And although the purchase agreements transfer only an *250 equitable interest in the property, under the SRETTA, the transfer of "*any* interest in the property" will suffice. MCL 207.523(1)(a) (emphasis added). As a practical matter, "[a] trial court should enforce the equities of the parties in such a manner as to put them as nearly as possible in the position that they would have occupied had the conveyance of the real property occurred when required by the contract." *Godwin v. Lindbert*, 101 Mich.App. 754, 758, 300 N.W.2d 514 (1980). In other words, "[l]and, traditionally presumed to have a peculiar value, is subject to specific performance." *Kent v. Bell*, 374 Mich. 646, 651, 132

N.W.2d 601 (1965). Here, each purchase agreement indicated a specific lot number that identified the real estate purchased. " Conceivably, [the land] could not be duplicated by an award of money." Id. Thus, execution of the purchase agreement transfers to the buyer an equitable interest in the property, which gives rise to a cause of action for possession of the property. Therefore, we conclude that the value of the property for purposes of assessment is determined at the time the parties execute the purchase agreement.

We reverse and remand for further proceedings. We do not retain jurisdiction.

WILDER, P.J., concurred.

DAVIS, J. (*dissenting*).

I respectfully disagree with my colleagues' interpretation of the State Real Estate Transfer Tax Act (SRETTA), MCL 207.521 *et seq.* I believe that it clearly articulates a legislative intent to impose a tax based on the value of property at the time title is legally transferred. I would therefore affirm.

MCL 207.523(1) imposes

a tax upon the following written instruments executed within this state when the instrument is recorded:

(a) Contracts for the sale or exchange of property or any interest in the property or any combination of sales or exchanges or any assignment or transfer of property or any interest in the property.

(b) Deeds or instruments of conveyance of property or any interest in property, for consideration.

Significantly, the purchase agreements involved here were not recorded. Only the subsequent deeds were recorded. On these facts, the plain, unambiguous language of the statute imposes a tax on the deeds, not the purchase agreements.

MCL 207.532(1) further provides, in relevant part, that the state real estate transfer tax "shall be paid only once" and "shall not be imposed on a written instrument that transfers property if the written instrument is given and the transfer made pursuant to a written executory contract upon which the tax was previously paid." No tax was previously paid here, nor could it have been because the only taxable instruments under the facts of this case are the instruments actually recorded.

The majority correctly points out that " '[v]alue' means the current or fair market worth in terms of legal monetary exchange *at the time of the transfer*." MCL 207.522(e) (emphasis added). MCL 207.532(1) also refers to "the transfer." The only logical interpretation is, as the majority concludes, that the Legislature intended to impose a tax on certain instruments conveying an interest in property at the time those instruments are recorded, but in an amount calculated on the basis of the value of the property when "the transfer" took place. The SRETTA does not explicitly define "transfer," other than clearly indicating that there can only be one "transfer" relevant to any given instrument. The majority erroneously concludes that, because *252 *a* transfer (of an equitable interest) took place with the execution of the purchase agreement, that must be *the* transfer.

The state real estate transfer tax is imposed only on the instrument that is actually recorded. The majority's construction of the statute would calculate the tax on the basis of a "transfer" that took place in an entirely different instrument, even though the recorded instrument upon which the tax is actually imposed *also* contains a transfer. This creates a complication that the Legislature did not intend from a plain reading of the statute. Indeed, the Legislature specifically provided for certain exceptions, such as land contracts, MCL 207.526(*o*), or instruments "to confirm title already vested in a grantee," MCL 207.526(n). If the Legislature had intended to impose a tax based on the *first* transfer, or based on *any* transfer, it could easily have said so. Instead, it refers to *the* transfer, logically referring to the transfer embodied in the instrument being recorded and on which the tax is imposed. Here, that refers to the transfer of legal title to the improved lot with the house on it.[FN1]

> FN1. Both fall within the definition of "property" under the SRETTA. MCL 207.522(b).

Reading the statute as a whole further indicates that the Legislature did not intend to include equitable transfers in computing the state real estate transfer tax. The majority relies heavily on the language "or any interest in the property" for its conclusion that a transfer of equitable title will suffice as a "transfer." However, the best way to determine "the current or fair market worth in terms of legal monetary exchange," MCL 207.522(e), is to examine how much money was, in fact, exchanged. When legal title passes, the seller is presumably satisfied that he or she has received full compensation, and the buyer is presumably satisfied that he or she is not paying too much. A purchase agreement conveys an equitable interest that could be enforced by filing suit for specific performance, but the

transaction is not complete at that point. More significantly, the classic understanding of an "interest in the property" is what *bundle of rights* the purchaser has acquired by the transaction, not the kind of suit that would be necessary to enforce those rights. For example, fee simple absolute is an "interest in the property," as is a life estate or a possibility of reverter. The majority's focus on a partial transfer of the relevant interest, rather than on the interest itself, further defeats the Legislature's intent.

The plain, unambiguous language of the SRETTA imposes a tax on the value of the transfer effectuated by the instrument that is being recorded. In this case, that transfer-by deed-is of legal title to the improved property, including the lot and the house. Therefore, I would affirm.

Michigan Tax Tribunal
State of Michigan

LAKE FOREST PARTNERS 2, INC., A MICHIGAN CORPORATION, PETITIONER

v.

MICHIGAN DEPARTMENT OF TREASURY, RESPONDENT

MTT Docket No. 292089
July 12, 2004

ORDER DENYING RESPONDENT'S MOTION TO STRIKE LAKE FOREST'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION AND IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8) AND (C)(10)

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

OPINION AND JUDGMENT

Procedural History:

Petitioner on June 24, 2002 filed a Petition with the Tribunal appealing Respondent Michigan Department of Treasury's Assessment Number K447066 against it. The

amount in controversy is tax in the amount of $65,968.00, together with penalty in the amount of $16,492.00, both of which accrue interest at the statutory rate as proscribed by sections 23 and 24 of Public Act 122 of 1941. The type of tax involved is the real estate transfer tax.

Respondent, Michigan Department of Treasury, through the Michigan Attorney General, filed a Response to the Petition on July 18, 2002.

On May 29, 2003, Respondent filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(10) and Brief in Support. On June 12, 2003, Petitioner filed its Brief in Opposition to Respondent's Motion for Summary Disposition.

On May 30, 2003, Petitioner filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (C)(10)[FN1] and Brief in Support. Respondent on June 12, 2003 filed its Response to Petitioner's Motion for Summary Disposition.

On June 23, 2003, the Tribunal entered an order denying both Petitioner's and Respondent's Motions for Summary Disposition.

On June 25, 2003, Respondent filed a Motion for Reconsideration of the June 23, 2003 Order denying its Motion for Summary Disposition, together with Brief in Support of its Motion.

On June 30, 2003, Petitioner filed a Motion for Reconsideration of the June 23, 2003 Order Denying its Motion for Summary Disposition, together with a Supplemental Brief in Support of its Motion for Summary

Disposition and in Opposition to Respondent's Motion for Summary Disposition.

On February 19, 2004, the Tribunal entered an Order Granting Petitioner's and Respondent's Motions for Reconsideration of the Tribunal's June 23, 2003 Order Denying Petitioner's and Respondent's Motions for Summary Disposition, an Order Setting Aside the June 23, 2003 Order Denying the Parties' Cross-Motions for Summary Disposition, together with a Sua Sponte Order requiring the parties to submit not later than April 1, 2004 a Stipulation of Material Facts sufficient to allow the Tribunal to decide this matter on the parties' respective Motions for Summary Disposition.

On April 1, 2004, pursuant to the February 19, 2004 Order, the parties filed with the Tribunal their Stipulation of Facts with two attached exhibits (*Washtenaw County* v *Lake Forest Partners 2, Inc*, Washtenaw Circuit Court Docket No. 00-579 CH, Opinion and Order Granting in Part Plaintiff's Motion for Summary Disposition and Granting in Part Defendant's Motion for Summary Disposition, dated August 15, 2001, and a Stipulation for Settlement and to Dismiss Remaining Claims with attached Consent Order dated November 1, 2001 in the same docket).

Standards for Determining Motions for Summary Disposition

Under MCR 2.116(C)(8), a motion for summary disposition will be granted only if claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Ladd* v *Ford C nsumer Finance Co, Inc*, 217 Mich App 119; 550 NW2d 826 (1996). The Court in *Cloverleaf Car Co* v *Phillips Petroleum Co*, 213 Mich App 186; 540 NWd 297 (1995), held that a motion for summary

disposition for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim by the pleadings alone and all factual allegations supporting the claim are accepted as true, as well as any inferences or conclusions that can be drawn from the facts In *Roberts* v *Vaughn*, 214 Mich App 625; 543 NW2d 79 (1995), the Court held that a motion for summary disposition for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim to determine whether an opposing party's pleadings allege a *prima facie* case, and the trial court must consider all well-pleaded facts in favor of the nonmoving party and should grant the motion only if allegations fail to state a legal claim.

Under MCR 2.116(C)(10), a motion for summary disposition will be granted if the documentary evidence demonstrates that that there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. *Smith* v *Globe Life Insurance*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

The Parties' Stipulation of Facts

1. Petitioner, Lake Forest Partners 2, Inc. ("Lake Forest"), is a Michigan corporation with its principal place of business in Pittsfield Township, Michigan (which is located in Washtenaw County, Michigan).

2. Respondent contends that Petitioner owes real estate transfer taxes in the amount of $65,968.00, together with interest computed in accordance with sections 23 and 24 of 1941 PA 122, and penalty in the amount of $16,492.00 for the tax period January 1, 1997 through September 30, 2000.

3. Lake Forest's practice with respect to the payment of real

estate transfer taxes on lot sales was as follows: In cases where only the lot existed at the time of contract, it paid real estate transfer taxes on the value of the lot only. In cases where a house existed on the lot at the time of contract, it paid real estate transfer taxes on the value of both the lot and the house.

4. The very transactions involved in this case were also the subject of a prior Circuit Court case, *Washtenaw County* v *Lake Forest Partners 2, Inc*, Case No. 00-579-CH, which was brought in the Spring of 2000 (the "prior case"). In that case, the County initially sought recovery of county and state real estate transfer taxes, but later confined its claims to county real estate transfer taxes. The Department of Treasury decided not to be a named party to the prior case.

5. In each of the transactions involved in this case and in the prior case, Lake Forest sold a vacant lot to a customer and concurrently entered an agreement to build a house for that customer. The agreement to sell the lot and the agreement to construct a home were embodied in a single document entitled "purchase agreement," which separately set forth the consideration for the lot sale and the consideration for the construction of the house. Lake Forest paid real estate transfer tax to the County and the State based on the value of the vacant lot as it existed at the time of the purchase agreement.

6. The County took the position that Lake Forest should have paid real estate transfer taxes on the combined value of the lot and the home that was ultimately built on the lot.

7. The parties in the prior case filed cross-motions for summary disposition, which were resolved in an August 15, 2001 Opinion and Order of the Circuit Court. The Circuit

Court ruled that Lake Forest was not liable for any of the claimed county real estate transfer tax deficiency. The Circuit Court's Opinion and Order is attached [to the Stipulation] as Exhibit 1.

8. The Circuit Court subsequently issued a consent order for the purpose of clarifying how post-complaint transactions involving the simultaneous sale of a vacant lot and entry of a contract to build a home were to be treated for real estate transfer tax purposes. Lake Forest had been using a single document to reflect both the lot sale and the contract to build a house. Under the consent order, so long as two documents in the prescribed form are used to reflect the lot sale and home construction contract, the real estate transfer tax will be assessed on the value of the vacant lot only, and not on the value of the lot and the home that is ultimately built on the lot. The consent order (which was stipulated to by Lake Forest and the County) is attached [to the Stipulation] as Exhibit 2.

9. The Department of Treasury maintains that the provisions of the consent order do not apply to the determination of the state real estate transfer tax. The Department does not endorse the language of that order. Lake Forest's position is that, while it has no objection to using the two-document form in order to meet the County's requirements for paying tax on the value of the vacant lot only, the relevant statutory language does not make the amount of transfer tax turn on the number of documents used to evidence the transaction.

10. The Department of Treasury did not participate directly in the prior case. The Department was made aware of the proceedings in the prior case by means of written and oral communications from Ian James Reach, the attorney for the

County in the prior case. Mr. Reach provided copies of filings in that case to Respondent, including the Complaint and the Court's August 15, 2001 Opinion and Order. Mr. Reach also provided Respondent with copies of documents obtained during discovery in the prior case, and these documents were later used to complete the audit and make the assessment in this case.

11. Following the audit, Respondent issued Intent to Assess K447066 to Petitioner.

12. An informal conference regarding Respondent's Intent to Assess was held on October 30, 2001, and a report was issued.

13. A Decision and Order of Determination was issued on May 20, 2002.

14. Final Assessment K447066 was issued on May 28, 2002.

15. The Treasury Department takes the position that Petitioner owes additional SRETT with respect to the real estate transactions due to Lake Forest's understatement of its real estate transfer tax base. Specifically, like the County in the prior case, the Department contends that the real estate transfer tax should have been computed not on the value of the vacant lot that was transferred, but rather on the value of the lot and the home that was ultimately constructed on it. Just as it argued in the prior case, Lake Forest contends that it was liable for payment of real estate transfer taxes on the value of the lot only.

16. If real estate transfer taxes for the transactions at issue are calculated on the value of the vacant lot only, then Lake

Forest owes no additional real estate transfer taxes.

17. Respondent has submitted the following motions and briefs in this Tax Tribunal proceeding that address the issues raised by this case:

1) May 29, 2003 Motion for Summary Disposition and Brief in Support;

2) June 12, 2003 Response to Petitioner's Motion for Summary Disposition;

3) June 26, 2003 Motion for Reconsideration of June 23, 2003 Order Denying Respondent's Motion for Summary Disposition;

4) July 9, 2003 Response and Motion to Strike Lake Forest's Supplemental Brief in Support of its Motion for Summary Disposition and in Opposition to Treasury's Motion for Summary Disposition; and Brief in Support;

5) July 9, 2003 Response and Motion to Strike Lake Forest's Supplemental Brief in Support of its Motion for Reconsideration; and Brief in Support;

18. Lake Forest has submitted the following motion and briefs in this Tax Tribunal proceeding, each of which addresses substantive issues relating to this case.

1) May 30, 2003 Motion for Summary Disposition;

2) June 13, 2003 Brief in Opposition to Treasury's Motion for Summary Disposition;

3) June 25, 2003 Supplemental Brief in Support of its Motion for Summary Disposition and in Opposition to Treasury's Motion for Summary Disposition;

4) June 30, 2003 Motion for Reconsideration of Tribunal's 6/23/03 Order;

5) July 1, 2003 Supplemental Brief in Support of its Motion for Reconsideration;

6) July 22, 2003 Brief in Opposition to Treasury's Motion

to Strike Lake Forest's Supplemental Briefs.

Case Overview

This matter involves the interpretation and applicability of MCL 207.521, et seq (State Real Estate Transfer Tax Act) to a series of transactions engaged in by Petitioner upon which the assessment in this matter is based. MCL 207.523 states:

> Sec. 3. (1) There is imposed, in addition to all other taxes, a tax upon the following written instruments executed within this state when the instrument is recorded:
>
> (a) Contracts for the sale or exchange of property or any interest in property or any combination of sales or exchanges or any assignment or transfer of property or any interest in the property.
>
> (b) Deeds or instruments of conveyance of property or any interest in property, for consideration.
>
> (2) The person who is the seller or grantor of the property is liable for the tax imposed under this act.

The State Real Estate Transfer Tax Act ("SRETTA") essentially mirrors MCL 207.501, et seq. (Real Estate Transfer Tax Act "RETTA"), whereas, the tax collected under MCL 207.501 goes to the county in which the property is situated, the tax collected under MCL 207.521 is paid to the State.

In 2000, Washtenaw County brought an action in the Circuit Court, *Washtenaw County* v *Lake Forest Partners 2, Inc*, Washtenaw Circuit Court Case No. 00-579 CH, alleging Lake Forest had failed to pay sufficient Transfer Tax on 45 transactions it had entered in Pittsfield Township. The parties have stipulated that the 45 transactions involved in this case and the Washtenaw

County case are the same in that Lake Forest concurrently entered into an agreement with a customer to sell a vacant lot and to construct a home. This agreement or agreements were embodied in a single document entitled "purchase agreement" and separately set forth the consideration for the lot sale and the consideration for the construction of the house. (Stipulation of Facts # 5) The purchase agreement was not recorded and the closing transferring title and possession to the purchaser did not occur until after the home was constructed and a certificate of occupancy issued. After the closing and at the time the deed was recorded, Petitioner paid the real estate transfer tax to the County and the State based on the value of the vacant lot at the time the purchase agreement was entered into rather than the value of the real property (lot and home) at the time of actual conveyance.

Petitioner's Position:

Petitioner claims that Respondent's claim is directly contrary to a prior Tax Tribunal ruling in *Sunshine Properties, Inc* v *Dep't of Treasury*, MTT Docket No. 267345, a 2000 decision of the Small Claims Division of the Michigan Tax Tribunal, and the Washtenaw County Circuit Court matter involving this Petitioner and Washtenaw County, *Washtenaw County, supra*, as that matter related to the collection of transfer tax under MCL 207.501, et seq.

Petitioner further claims that Respondent is barred by the doctrine of collateral estoppel from advancing an interpretation of MCL 207.521 that is contrary to *Sunshine Properties* and from relitigating the Circuit Court's determination that any new interpretation of the State Real Estate Transfer Tax Act may not be retroactively applied.

In the alternative, Petitioner asks the Tribunal to find the

State Real Estate Transfer Tax Act ambiguous, as applied to the facts of this case, and apply the longstanding principle that statutes imposing taxes that are ambiguous must be construed in favor of the taxpayer

Respondent's Position:

Respondent contends that the SRETTA is clear and unambiguous, *collateral estoppel* and *res judicata* do not apply to this matter either as a result of the *Sunshine Properties* case or the *Washtenaw County* case, and the Tribunal is not bound by the decision in *Washtenaw County* to apply only prospective application to the decision.

Respondent states that Petitioner's purchase agreement with its purchaser is not a land contract and does not transfer any interest in the land at the time it is executed and that no transfer of interest occurs until the property had been improved (home constructed) and that Section 525 of SRETTA levies the tax based upon the total value of the property being transferred at time of transfer.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The underlying issue to be resolved in this matter is whether the Department of Treasury properly assessed the State Real Estate Transfer Tax consistent with the statute (MCL 207.523) and legislative intent.

In order to resolve this issue, the Tribunal must first look to the statute and then to the actual transactions, together with the documentation supporting these transactions. (Copies of the documents representing a sampling of these

transactions are attached to Respondent's Motion for Summary Disposition and Brief in support as Respondent's Exhibits F-1, F-2 and F-3).

MCL 297.523 imposes in addition to all other taxes, a tax upon the following written instruments executed within this state when the instrument is recorded:

> (a) Contracts for the sale or exchange of property or any interest in property or any combination of sales or exchanges or any assignment or transfer of property or any interest in the property.
>
> * * *
>
> (c) Deeds or instruments of conveyance of property or any interest in property, for consideration. (emphasis added).

A review of Paragraph 5 of the Stipulation of Facts, and Respondent's Exhibit F-3 in Support of its Motion for Summary Disposition, indicate that the agreement to sell the lot and to construct a home were embodied in a single document entitled "purchase agreement," which separately set forth the consideration for the lot sale and the consideration for construction of the house. The Tribunal notes that Respondent's Exhibits F-1 and F-2 contain purchase agreements on Ann Arbor Board of Realtors forms that do not break down the purchase price between the lot and the house. In all instances, a single closing occurred after the home was constructed, and a certificate of occupancy issued. At the time of the closing, the purchaser delivered the balance of the purchase price (total price less good faith deposit) and Petitioner delivered a warranty deed.

The Tribunal must resolve the question: Did the purchase agreements involved in this matter transfer any interest in property at the time they were entered into or did the transfer of interest occur at the time the warranty deed was executed and delivered to the purchaser at time of closing?

In Michigan a distinction is made between the contract for the sale of land and a "land contract." A contract for the sale of land is quite simply a purchase agreement. *Zurcher* v *Herveat*, 238 Mich App 267, 282; 605 NW2d 329, 336-37 (1999). A contract for the sale of land is an agreement containing the names of the parties, a description of the property, the consideration to be paid for the land, and the terms and time of payment and performance. *MacRitchie* v *Plimd*, 70 Mich App 242; 245 NW2d 582 (1976). However, there is no indication from case law that signing a contract of the sale of land transfers any interest of the property from the seller to the buyer until both parties have completely satisfied the terms and conditions set forth in that contract. In the present matter, Petitioner (the builder) must deliver a Certificate of Occupancy or Temporary Certificate of Occupancy and must complete the house according to the builder's standard features and such additional features which are designated in "Exhibit A" of the Purchase Agreement. Closing will occur at such time after the Certificate of Occupancy is issued, at which time the purchaser will pay the balance of the purchase price and Petitioner (builder) will deliver a Warranty Deed. (See Respondent's Exhibit F-3). The Purchase Agreement does not give the purchaser the right to possession of the property nor does risk of loss pass until the deed is delivered to the purchaser and contract balance paid to Petitioner. In other words, although a purchase agreement has the basic elements of a land contract, the major distinction is that a purchase agreement does not give the purchaser a present title or the right of possession. Rather,

a purchase agreement contemplates a period for satisfaction of conditions, followed by a closing at which the purchaser receives title and/or the right of possession.

In contrast to the purchase agreement or contract to purchase that is present in this matter is a land contract. A land contract is a contract for sale of property under which legal title is retained by the seller (vendor) and an equitable title or interest is obtained by the buyer (vendee). *Tidwell* v *Dasher*, 152 Mich App 379; 393 NW2d 644 (1986). The seller holds legal title as security for the payment of the purchase price. *Id.* The buyer, on payment of the purchase price in full, has the right to have a conveyance of the legal title. *Id.* In other words, it is a contract for the sale of an interest in real estate. In addition to the requirements of the contract of the sale of land stated above in the previous section, the statute of fraud in the case of land contracts requires that the parties' written instrument include a definite statement of the terms of credit upon which they have agreed. *Tuscon* v *Farrington*, 396 Mich 169; 240 NW2d 464 (1976). Michigan law also requires that the land contract "be executed by the vendor named in the contract, and acknowledged before any judge or before any notary public within [the state of Michigan] and the officer taking the acknowledgment shall endorse a certificate of the acknowledgment and the date of making the acknowledgement under his or her hand." MCL 565.351 (2003). No such acknowledgement is present in this matter nor does the purchaser have a present right to possess the property.

The Tribunal finds that the transactions between Petitioner and its purchasers did not give rise to a transfer of any interest in the property whatsoever at the time of execution of the Purchase Agreement but rather the

transfer occurred at the time of the conveyance of the property by warranty deed. Accordingly, under the clear and unambiguous terms of MCL 297.523, the value of the property at the time that the warranty deed (transfer of interest) is delivered to the purchaser is the base upon which the transfer tax is imposed and upon which Respondent based its assessment. In making this determination, the Tribunal has given the plain ordinary meaning to the word "transfer" or "transferred" as those words are used in subsection 522(e), MCL 207.522(e) and section 525, MCL 207.525.

Black's Law Dictionary, 7th Ed., at 1503, defines "transfer" as "[a]ny mode of disposing of or parting with an asset or an interest in an asset." The word "interest" is defined as "[a] legal share in something; all or part of a legal or equitable claim to or right in property." *Id* at 816. "Equitable interest" is defined as "[a]n interest held by virtue of an equitable title or claimed on equitable grounds ...." *Id.* "Equitable title" means "[a] title that indicates a beneficial interest in the property and that gives the holder the right to acquire formal legal title." *Id* at 1493. "Legal title" is defined as "[a] title that evidences apparent ownership but does not necessarily signify full and complete title or a beneficial interest." *Id.* "Beneficial interest" is defined as "[a] right or expectancy in something." *Id* at 149.

The Tribunal will next address Petitioner's contention that Respondent in this matter is barred under the doctrines of *collateral estoppel* or *res judicata* from relitigating issues already litigated in the Tax Tribunal in *Sunshine Properties* and in *Washtenaw County.*

The Tribunal finds that Petitioner's reliance on *Sunshine Properties* is clearly misplaced and without merit.

Sunshine Properties was a matter commenced and decided in the Small Claims Division of the Tribunal. MCL 205.765 states "[a] decision of the division is not precedent unless so designated by the tribunal." A review of the tribunal's records does not indicate that *Sunshine Properties* has been designated as precedential. Since small claims cases are heard and decided without a record, there is no way to ascertain whether the facts and documents present in *Sunshine Properties* are in any way similar to those in this matter.

As to the effect of *Washtenaw County* cited on this matter, the Tribunal finds that the subject matter of that action was the RETTA and not the SRETTA. The parties in that action were Washtenaw County and the Petitioner in this action and, although both cases involved the same underlying transactions, the tax sought to be collected and the parties were different. Respondent in this case was not a party in the *Washtenaw County* matter.

In order to determine whether Respondent's action (assessment) is barred by collateral estoppel, we must examine both the *Washtenaw County* final decision in light of general collateral estoppel requirements and the two-part test adopted in various cases, *e.g., Roman Cleanser Co* v *Murphy*, 386 Mich 703-04; 194 NW2d 704 (1972). The decision will be precluded under the collateral estoppel doctrine under the following two-part test when (1) an issue of fact or law is actually litigated and determined by a valid and final judgment, *Lichon* v *Am Universal Ins Co*, 435 Mich 408; 459 NW2d 288 (1990); and (2) the respective litigants were parties or in privity with a party to an action in which a valid judgment has been rendered, *Howell* v *Vito's Trucking and Excavating Co*, 386 Mich 37; 191 NW2d 313 (1971).

To elaborate on the two-part test, the Michigan Court of Appeals held that "[t]he doctrine of collateral estoppel holds that where the first and second causes of action are different, the judgment rendered in the first case is conclusive between the parties in such a case as to questions actually litigated and determined by the judgment." *Alterman* v *Provizer*, 195 Mich App 422; 491 NW2d 868 (1992). By the very definition of the doctrine, one of the critical factors is whether the respective litigants were parties or in privity with a party. In other words, the estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it had it gone against him." *Lichon, supra*. Furthermore, the court in *City of Detroit* v *Qualls* held that the party asserting collateral estoppel as a defense has the burden of persuasion to convince the Tribunal that the respondent is precluded from raising the issue of state transfer tax. 434 Mich 340; 454 NW2d 374 (1990).

The Tribunal finds, based upon the parties' Stipulation of Fact # 10, that Respondent did not participate directly in the Washtenaw Case although it had been made aware of the proceedings by means of written and oral communications from the County's attorney. The Tribunal further finds that such awareness on Respondent's part does not raise to the level that this Tribunal can find that Respondent was in any way in privity with the County. It is further noted that the Washtenaw Circuit Court was without jurisdiction to review tax determinations made by the Department of Treasury and reviewable only by the Tax Tribunal. See, *e.g.*, *Jackson Community College* v *Michigan Dept of Treasury*, 241 Mich App 673, 682; 621 NW2d 707 (2000).

So, this case presents the question whether the doctrine of collateral estoppel operates to prevent Respondent from renewing a cause of action before the Tribunal where the Tribunal resolved to a certain extent identical controversy for fairly identical parties. Even if the Tribunal would consider and be bound by the *Sunshine Properties* case, although Respondent in this action was also the respondent in *Sunshine* and the tax assessed was the same (SRETT), this Petitioner was not involved in that case, and it appears from the limited small claims record that the purchase documents involved in *Sunshine* were different than here and that the lots sold and the houses being constructed were by two different parties. The Tribunal finds, after applying applicable law and the facts stipulated to in this matter, that the doctrine of collateral estoppel does not apply so as to foreclose the assessment at issue in this matter.

Under the doctrine of *res judicata*, a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. The doctrine operates where the earlier and subsequent actions involve the same parties or their privies, the matters of dispute, or where the matter should have been resolved in the earlier adjudication, and the earlier controversy was decided on its merits. The parties in the *Washtenaw County* case were not the same, nor was Respondent in this matter in privity with Washtenaw County and further, the Circuit Court, for reasons previously stated, was without juridisdiction to render a decision on Respondent's assessment under the SRETTA. The Tribunal thus concludes that *res judicata* does not apply in this case.

The Tribunal finally shall consider Petitioner's argument that the Tribunal should follow the lead of the Washtenaw Circuit Judge and not give retrospective effect to its decision.

Petitioner argues that the Tribunal should not retroactively impose a new interpretation of the State Real Estate Transfer Tax Act. In support of its argument, Petitioner relied on *Washtenaw County* v *Lake Forest Partners 2, Inc*, Docket No. 00-590-CH, which applied prospectively the county transfer tax. In *Washtenaw County*, the circuit court stated that prospective application of a decision is appropriate when it decides "an issue of first impression whose resolution was not clearly foreshadowed." *Id* (citing *Lindsey* v *Harper Hosp*, 455 Mich 56, 68 (1997)). It further held that decisions should be given limited retroactive or prospective effect only, as necessary to maintain the "maximum of justice" under the circumstances, when injustice may be the result of a full retroactive application. *Id; Tebo* v *Havlik*, 418 Mich 350, 360; 343 NW2d 181 (1984).

However, based on case law, "[t]he general rule is that judicial decisions are to be given complete retroactive effect ... [and c]omplete prospective application has generally been limited to decisions which overrule clear and un-contradicted case law." *Hyde* v *Univ of Mich Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986); *Syntex Labs* v *Dep't of Treasury*, 233 Mich App 286, 292; 590 NW2d 612 (1998). So, the key question in deciding if a decision should be given prospective or retroactive application is whether the judicial decision announces a new and unexpected rule of law, or it merely clarifies, extends, or interprets existing law. Furthermore, the Michigan Supreme Court held that a decision should be

applied prospectively if it overrules settled precedent or resolves an issue of first impression "whose resolution was not clearly foreshadowed." *Lindsey* v *Harper Hosp*, 455 Mich 56, 68 (1997) (citing *Chevron Oil Co* v *Huson*, 404 US 97, 106 (1971)). However, a decision on an issue of first impression does not necessarily require prospective application. If the decision merely provides a clarified legal interpretation without announcing a new rule of law or a change in existing law, the decision should be retroactively applied. *Jahner* v *Dep't of Corr*, 197 Mich App 111, 114; 495 NW2d 168 (1992).

The Tribunal, as previously set forth, finds that *Sunshine* established no settled precedent and, in fact, no precedent whatsoever. Further, considering that the Tribunal has found that the MCL 207.523 is clear and unambiguous, it cannot be said that the Tribunal's interpretation of MCL 207.523 could not have been foreshadowed. It cannot be said that Petitioner relied on the decision in *Washtenaw County* to its detriment in this case because the same transactions were involved in both matter. The Tribunal believes that the circuit judge's decision in *Washtenaw County* to give prospective effect only to its decision was wrongly decided and the Tribunal is in no way obligated to continue this error. *Magreta* v *Ambassador Steel Co*, 380 Mich 513,517; 158 NW2d 473, 474 (1968).

JUDGMENT

IT IS ORDERED that Respondent's Motion To Strike Lake Forest's Supplemental Brief in Support of Its Motion For Summary Disposition and in Opposition to Respondent's Motion For Summary Disposition is DENIED.

IT IS FURTHER ORDERED that Petitioner's Motion For

Summary Disposition Pursuant To MCR 2.116(C)(8) and (C)(10) is DENIED.

IT IS FURTHER ORDERED that Respondent's Motion For Summary Disposition Pursuant To MCR 2.116(C)(10) is GRANTED for the reasons set forth in this Opinion and Judgment and specifically upon the finding that, based upon the Stipulation of Facts and other documentary evidence provided by the parties, there is no genuine issue of material fact, and Respondent is entitled to judgment as a matter of law.

IT IS FURTHER ORDERED that the Michigan Department of Treasury's Assessment Number K447066 is hereby AFFIRMED.

s/Kimbal R. Smith III

Tribunal Judge Presiding

FN1. MCR(C)(8) "The opposing party has failed to state a claim on which relief can be granted."

MCR(C)(10) "Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

STATE OF MICHIGAN
DEPARTMENT OF TREASURY
TREASURY BUILDING
LANSING, MICHIGAN 48922

JOHN ENGLER, Governor
DOUGLAS ROBERTS, State Treasurer

November 13, 1996

Mr. James H. Novis, Esq.
Honigman, Miller, Schwartz & Cohn
2290 First National Building
Detroit, MI 48226

Dear Mr. Novis:

Your letter of inquiry requests a ruling as to the transfer of a lot under a land contract followed by non-infrastructure related lot improvements, market appreciation, and/or construction of a home.

Based upon the facts that you have presented, it has been concluded that (1) the transfer of real estate occurring under a land contract is subject to the State Real Estate Transfer Tax at a rate of $3.75 per $500.00 of value; (2) the tax is measured by the value of the lot on the date of the transfer; (3) the imposition of the tax is deferred until the land contract is paid and/or legal title to the property is transferred by the recording of the warranty deed, and (4) the taxable value of the lot is not changed by any increase

or decrease in the value of the lot occurring after the transfer.

This conclusion is illustrated by a taxpayer that purchases a residential lot from a developer for $35,000 under a two-year land contract. The lot appreciates in value to $50,000 by the end of the first year. In year two, the taxpayer plants numerous trees and hires a builder, other than the developer of the lot, to construct a home on the lot for $145,000. Upon completion of the home, permanent mortgage financing is obtained, the land contract is paid, and a deed is recorded. Transfer Tax on the value of the lot on the date of the transfer (i.e. $35,000/500 X $3.75 = $262.50) is due at the time the deed is recorded. The market appreciation in the value of the lot, improvement of the lot and value of the home are not included in taxable value because they all occurred after the transfer subject to tax.

Sincerely,

s/Roger A. Ruppal, Acting Administrator
Single Business Tax Division

RAR:bln